

*To David Cunningham
of George Homepurse*

June 12. 1760.

26

ANSWERS

F O R

DAVID CUNNINGHAME Baxter in *Edin-*
burgh, Pursuer;

25.

T O T H E

PETITION of *George Home*, late Deacon,
and *Charles Cunningham* present Boxmaster, of
the Incorporation of Baxters of *Edinburgh*, *David*
Simpson Agent or Collector, *James Fraser* Clerk,
and *James Dougal* and others, Servants to the
Members of the Incorporation, in the Manage-
ment of their Mills, Defenders.

DAVID CUNNINGHAME the Respondent, upon the
24th Day of *July 1759*, as Creditor to *Jean Haig*
Relict of *John Allan* Baxter in *Edinburgh*, arrested
a Quantity of Wheat, which had been brought to
the *Water of Leith* Mills, in order to be grinded for her, in
the Hands of the Petitioners; and thereafter brought a
Furthcoming before the Baillies of *Edinburgh*.

It was pleaded in Defence, that the Arrestment was not
competent in this Case; for that neither the Corporation of
Baxters, the Proprietors of the Mills, nor the Millers em-
ployed

made in the Court of the Lord Ordinary
24th January 1760
employed to grind it, were to be considered as Possessors of the Wheat, which from Time to Time was sent to these Mills to be grinded, by the several Members of the Incorporation; but that the Possession continued with each respective Member; and that the Millers were for that Period to be considered as his Servants.

The Baillies, on the 13th Day of *December* 1759, 'Repelled this Defence, and sustained Process, and admitted the Libel to Probation.' But the Petitioners, not satisfied with this Interlocutor, brought the Cause before your Lordships by Advococation. Their Success was no better here than before the Baillies; for the Lord *Edgefield* Ordinary, upon the 26th *February* 1760, pronounced the Interlocutor recited in the Petition, 'Finding the Diligence by Arrestment at the Pursuer's Instance competent; and therefore repelling the Reasons of Advococation, and remitting the Cause in common Form.'

The Petitioners now reclaim, and insist upon the same Arguments which were urged for them before the inferior Court, and insisted on before the Lord Ordinary; the Tendency of which is to withdraw from the Diligence of Creditors, the Wheat which belongs to the Corporation of Baxters, and give them an Immunity which none of the other Subjects of this Kingdom have been understood to enjoy. The Genius and Principles of our Law have, with much Wisdom, protected and favoured Creditors in their Endeavours to recover Payment of their just Debts; and it would be attended with very severe and hurtful Consequences to Commerce, and to the established Train of Connections which subsist in political Society, if a different System of Principles were to take place.

It is hoped the Court will see no Reason here to grant a singular Privilege to the Incorporation of Baxters. The Argument they have been pleased to throw out, as if great Inconveniency would arise from the want of a Place in the Mills to deposite the arrested Goods, is imaginary; for, after the



the Arrestment, nothing hinders the Goods to be removed from the Mill to a safe Place, at the Expence of the Arrester, provided they are not restored to the Debtor. And therefore the present Question must be determined upon the pure Principles of Law, as hitherto established ; and unless it shall appear, that, according to these Principles, this Corporation is endowed with this singular Privilege, that the Wheat belonging to them is not arrestable, no Difficulty will remain with your Lordships in adhering to the Lord Ordinary's Interlocutor, in Terms of the Judgment given by the inferior Court.

It is admitted, in Point of Fact, that the Incorporation of Baxters are Proprietors of the Mill, in Question, by a Feu from the Town of *Edinburgh*, granted to the Deacon and Boxmaster, and their Successors, for the Behoof of the Incorporation : That, at an annual Meeting of the Incorporation, the Servants of the Mill are chosen, particularly a certain number of Millers and Load-men, a Clerk, and a Collector : That the Clerk has a Salary, and the Servants are paid their Wages by a certain Proportion out of each Bag of the Flour grinded : This is regularly paid at the Time of grinding, to avoid Confusion, before the Flour is carried from the Mill : That each Member of the Incorporation is intitled to send his Grain to be grinded, by a sort of Rotation, which may, however, be varied by the Deacon and Boxmaster, when there is a Scarcity of Water ; and while any Member's Rotation lasts, the Servants are obliged to employ themselves and the Mills in grinding his Parcel ; but when any Member is fined by the Corporation the Deacon can stop his grinding till the fine be paid : That, besides the Servants Dues, the Baxter pays a certain Sum for each Bag to the Corporation, as Mill Rent, or Multure, which is received by the Collector, annually appointed, agreeable to an Account made out by the Clerk.

Upon these Facts the Petitioners found their Plea, That no Wheat belonging to any Member of the Incorporation can be arrested,

arrested, while at the Mill, on Pretence that here Mrs. Haig, the Debtor, had a joint Property in the Mills, and the Mill-Servants were to be considered as her Servants, when employed in grinding and taking Care of her Wheat; that the Possession therefore, was to be considered, as continued with her; and the Petitioners refer to the Maxim of Law, That Arrestment cannot be effectually used in the Hands of any Person who is not the actual Possessor, nor in the Hands of the Debtor himself, and of Course, not in the Hands of his Servants, whose Possession is the Debtor's Possession. In support of this Doctrine, they plead, That the Arrestment in the Hands of the Deacon and Boxmaster is ineffectual, because the Deacon and Boxmaster have no Possession of the Mills; for that the Members of the Incorporation are the Proprietors, and in the Possession, both civil and natural, of these Mills: That the Direction of these Mills is in the Members, and the Deacon and Boxmaster know nothing of what is passing in the Mills, unless when their own particular Rotation comes; and, if they, and the Funds of the Incorporation, were to be answerable for the Consequences of Arrestments laid in their Hands for attaching Goods in the Mills, it might prove ruinous to the Funds of the Incorporation: That neither can the Arrestment in the Hands of the Millers be effectual; because the Servants at the Mill, during each Rotation, are the Servants of that particular Member whose Wheat is grinding: That they possess for him; and that Arrestment can no more be effectual in their Hands, than it would be in the Hands of the Debtor himself; in the same Manner as if a Proprietor of a Mill employed his own Servant to take Care of it, and an Arrestment were attempted in the Hands of that Servant of his Master's Grain. That the Case is here the same; for the Members of the Incorporation are joint Proprietors, nor can their Servants be said to possess either *animo* or *corpore*.

The whole of these Arguments proceed upon a Mis-apprehension of the Principle of Law, That Goods cannot be arrested

rested in the Hands of the Debtor himself. It is not very long ago, that Arrestments were sustained even in the Debtor's own Hands; of late, however, the contrary Doctrine has been very justly established, upon this Ground, That such Arrestments could have no further Effect against the Debtor himself, who is already liable for the Debt, except to confiscate all his Goods for Breach of Arrestment; and therefore, could be attended with no good Consequence to the Arrester, unless extended against *bona fide* Purchasers, which would have greatly marred Commerce, and the free Disposal of moveable Goods: But wherever the natural Possession of the Goods is transferred to a third Party, this useful Diligence of the Law is justified by Expediency, and authorized by Practice. Arrestment laid on, in the Hands of such third Party, is a legal Prohibition against him to give up the Possession of the Goods; and, if he disobey this Prohibition, he must answer for the Consequences, and pay the Debt himself, which occasions no Bar to Commerce, nor inflicts Punishment upon an innocent Party, but only renders the Arrestee liable to the Debt, if he despises and disobeys the express Prohibition of the Law.

The Respondent therefore apprehends, that the general Principle of Law, in Favour of Arrestments, must prevail, unless in Cases where the evident Interest of Commerce interferes, and where the giving Effect to Arrestments would be attended with the Punishment of innocent Parties: And, upon this Footing, the Respondents cannot perceive why Arrestment, even in the Hands of a Servant, might not be effectual, so as to import a Prohibition on the Servant to give up the natural Possession of the Goods, under the Penalty, that, if he does, he shall be liable for the Debt. This Doctrine appears to be established by a Decision, thus abridged in the Dictionary, *voce* Arrestment: ' A Man who was Debtor to another, for the Price of
' some Victual, having given a Factory to his own Wife, who,
' by Virtue thereof, uplifted Debts due to her Husband, and
' the Creditor, both arresting in her Hands, and in her Husband's,

band's, and thereafter transferring the Debt, after the Husband's Decease, against his Heirs *passive*, and pursuing Further against the Wife and Children; the Lords sustained the Arrestment, and ordained the Wife to depone what was in her Hands at the Time, reserving to her to be heard upon any Title, by which she might crave Preference to the Pursuer; but found that the Debt must first be constituted; tho' here it was alledged, That Arrestment in a Debtors own Hand was never before allowed, save once. *Fountainhall, 18th July 1706. Hume contra Pringle.*

In this Case, the Arrestment was laid on in the Hands of a Wife acting for her Husband, and found effectual to oblige her to make good what was in her Hands at the Time of the Arrestment; because, notwithstanding the Connection between her Husband and her, and tho' her Possession might in some Sense be considered as his, yet, as after the Dissolution of the Marriage, the Wife became a distinct Person, and capable of being subjected for her Debts and Deeds, the Court sustained the Arrestment in her Hands as effectual to subject her.

The Petitioners endeavour to introduce a Distinction between legal or civil Possession, and natural Possession; and seem to maintain, that Arrestment can only be used in the Hands of him who possesses *civiliter*; and that a Servant is in no Sense to be considered as a Possessor.

The Respondent however cannot agree to this Doctrine; he apprehends that a Servant is such a Possessor as the Law requires, in order to found an Arrestment. He is intitled, after the Prohibition of the Law, to refuse Delivery of the Goods to his Master; and if he does deliver them, contrary to the Prohibition, there is nothing unjust or unreasonable in subjecting him to Payment of the Debt, as a Penalty; and more especially, in the Case where a Servant lives in a separate House from his Master, of which he himself keeps the Key, an Arrestment of his Master's Goods in his Possession

session, according to all the Rules of common Sense, as well as Law, must be effectual. This however is the present Case with regard to the Servants at this Mill, even supposing they could be considered as the immediate Servants to each Member during his Rotation.

The Arrestment in Question is to be considered in two different Views: *1st*, As an Arrestment in the Hands of the Deacon and Boxmaster, as Proprietors of the Mills, and in the civil Possession thereof. *2^{dly}*, As an Arrestment in the Hands of the Servants at the Mills, who are in the natural Possession of the Wheat while it is there to be grinded.

The Petitioners maintain, that neither of these Arrestments are effectual; because, as to the Deacon and Boxmaster, they cannot be considered as having any Possession; but that the Corporation are the Proprietors, and also the Possessors; that no particular Member knows any thing of what is passing, except during his own Rotation, and therefore cannot be answerable for Goods in the Mills, arrested in their Hands, so as to affect the Funds of the Corporation. And, as to the Servants, it is argued, that they are merely the Servants to the Member, whose Turn it is, and that their Possession is his Possession:

But the Respondent maintains, that each of these Arrestments, severally, were effectual to attach the Goods of *Jean Haig*, in the Mill at the Time; for, with respect to the Deacon and Boxmaster, they, as the legal Representatives of the Incorporation, are undoubtedly the Proprietors, and Possessors of the Mill. The Feu right is taken in their Name, and Arrestment in their Hands is held in Law, as Arrestment in the Hands of the Corporation. Thus, if any private Gentleman were allowed to grind Wheat at these Mills for his own Use, and a Creditor of his inclined to arrest it, he would exactly follow the Method the Respondent took, and would have arrested in the Hands of the Deacon and Boxmaster, and in the Hands of the Servants,

at

at the Mills. The Deacon and Boxmaster are considered as having Possession of the Mill, as much as a Stabler or an Innkeeper is considered as Possessor of his own Stables, altho' his Groom or Ostler may keep the Key, and he would be liable for Breach of Arrestment, if the Goods were delivered up by his Servant to the Debtor, tho' he might pretend it was without his Knowledge; because it was his Duty, the Instant the Arrestment was laid on, to intimate to his Servant to detain the Goods. And as the Deacon and Boxmaster can prohibite grinding for any Member, till he pays a Fine, so they can undoubtedly stop arrested Victual from being delivered up.

In like Manner, the Respondent apprehends, that the Arrestment in the Hands of the Millers, was, in this Case, a good and effectual Arrestment; not only because agreeable to the Doctrine above-explained arrestment, even in the Hands of a Servant is effectual, by the Principles of the Law of *Scotland*; but further, because, in this Case, the Millers are not, according to any Propriety, to be considered as the Servants of each particular Member, during his Turn. They are hired by the Corporation annually; the Care and Direction of the Mill is committed to them by the Deacon and Boxmaster, in Name of the Corporation. The Deacon and Boxmaster, during a Scarcity of Water, are intitled to give Orders to the Servants at the Mill, not to grind for any particular Member, preferably to the Orders of the Member whose Turn it is, and can diminish the Quantity any one is allowed to grind, or alter the Rotation. And it is the constant Practice of the Corporation, when a Member is fined for any Trespas against their By-laws, to put a stop to their grinding any Wheat at the Mills till Payment of the Fine; and this is done by an Order from the Deacon, Boxmaster, or Manager, to the Clerk, either in Writing or by verbal Order. And altho', to avoid Confusion, these Servants are paid by receiving a certain Quantity out
of

of each Parcel grinded, yet this can by no Means constitute them Servants to any one Member ; they continue, notwithstanding, the Servants of the Corporation ; for the Servants at all Mills are in the same Manner paid, by receiving a Proportion of what is from Time to Time grinded ; and yet they continue the Servants of the Proprietor, or Tacksmen of the Mills.

Nor can it make any Difference, that *Jean Haig*, the Proprietor of this Wheat, is so far considered as a Member of the Corporation, to whom the Mills belong, as to have the Privilege of grinding in her Turn ; for the Wheat, it is allowed, was her separate Property ; and it is undoubted Law, that if a Member of a Copartnery lodges Goods, which are his separate Property, in the Hands of the Copartnery, these Goods may be arrested in the Company's Hands, altho' he himself is a Member of that Company in whose Hands they are arrested.

The Respondent shall make no Answer to what is mentioned in the End of the Petition, as if Grain brought to a Mill for the sole Purpose of grinding, or a Horse brought to a Smiddy to be shoed, or Plow-Irons to a Smith to be mended, were not attachable by Arrestment. He apprehends, that in each of these Cases Arrestment is competent, and that the Miller or the Smith would be liable for the Debt, if they delivered up these Goods to the Debtor, contrary to the Prohibition of the Arrestment.

In Respect whereof, &c.

WILLIAM JOHNSTONE.

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of each Party... by no means...
...to say the least; they continue, not-
withstanding, the objects of the Corporation; for the Ser-
vants of all... by receiving
a portion of... to be graded; and
...of the Corporation of Town-

...the Pro-
prietor of this Wharf, is to be considered as a Member of
the Corporation, to whom the Wharf belongs, as to have
the privilege of... for the Wharf, it is
...; and it is understood that
...Goods, which are in
the hands of the Corporation, shall
...the Corporation's Hands, and the
Corporation in whole Hands



...is men-
tioned in the Bill of the Petition, as if it is brought to
a Mill for the sole purpose of grinding, or a House brought
to a mill to be used, or otherwise for a Smith to be
...the Corporation is competent
and that it is one of the Smith's goods, belong to the
Corporation, if they delivered up these Goods to the Mayor,
...of the Corporation.

...in the Corporation...
...the Corporation...
...the Corporation...